SOUTHERN BANK BHD

v.

ENTIGMA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HELILIAH MOHD YUSOF J
[ORIGINATING SUMMONS NO: S7-24-805-2002]
22 OCTOBER 2002

LAND LAW: *Charge - Order for sale - Cause to the contrary - Whether established - Originating summons not containing statement on provisions of s. 257(1)(e) National Land Code - Whether application for order for sale defective - Whether omission of no consequence - Whether needed no amendment - National Land Code, ss. 256, 257, 258, 259 - Rules of High Court 1980, O. 7 r. 3, O. 83*

The plaintiff had granted several financial facilities to the defendant upon the security of a charge. Upon the defendant's failure to repay, the plaintiff sought to sell the charged land and consequently applied for an order for sale pursuant to s. 256 National Land Code ('NLC'). The defendant opposed the application, arguing that the plaintiff, by unilaterally inflating the interest rates, was in breach of the agreement. This apart, the defendant also argued that the application ought to be struck off as the plaintiff's originating summons was defective in law. According to the defendant, the Federal Court decision in *Maimunah bt Megat Montak v. Mayban Finance*, by analogy, made it mandatory for such originating summons to contain a statement on s. 257(1)(e) NLC, and that being so, any failure to incorporate the provision, as was the case here, was fatal to the summons application. The primary issue that arose was whether, bearing in mind the aforesaid Federal Court authority, as well as Act A1104 which amended s. 257 NLC, the plaintiff's originating summons here ought to be amended so as to include a statement on s. 257(1)(e) NLC. Consequently, a question also arose as to whether the defendant had established any cause to the contrary so as to defeat the plaintiff's application herein.

Held:

[1] The defendant had not raised any cause to the contrary. As for the allegations that the plaintiff had not given any notice about the variation of interest, the facts showed that such notices had been given to the

defendant. The facility agreement had also provided for variations of interest and the defendant had not shown that they had in any way disputed the plaintiff's right under the agreement to impose and vary the interest. (p 973 e-f & 974 c)

[2] Section 257 NLC is a consequence that follows in that it is addressed to the court as to what should be the contents of an order for sale once it is satisfied that a chargor has not been able to establish the existence of a cause to the contrary. The section is not to be read in isolation but to be read together with ss. 258 and 259 of the NLC. (p 976 e-g)

[3] The decision of the Federal Court in *Maimunah bt Megat Montak* cannot be literally and blindly applied in respect of the construction of s. 257 NLC. To do so would result in an amendment that is not intended by the section in that it has the effect of the substance of paras. e-h being litigated as though it is part of the processes which the court has to deal with in considering an application under s. 256 NLC. (p 976 g-h)

[4] The amendment to s. 257 NLC *vide* Act A1104 does not constitute a change in the sequence of the enforcement of an order for sale made by the court pursuant to s. 256. No doubt the amended section states that the order shall be in Form 16H, but that only serves as a directive to the court as to what should be stated in the order for the registrar to deal with in the course of a sale. Form 16H does not conflict with the provisions of s. 257. It just sets out the various particulars to be stipulated upon an order for sale being made. (pp 977 g-h & 979 a)

[5] There are two stages involved in the processes under ss. 256 and 257 NLC, namely the court having made an order for sale and the order for sale having to be in Form 16H as introduced by the amendment. Accordingly, the argument of the defendant that paragraphs introduced by the current amendment should also constitute part of the originating summons would result in changing the processes in which the trial is to be conducted and which matter should accordingly be effected not under the NLC but, if at all, under the Rules of the High Court 1980. Hence, no amendments need to be filed by the plaintiff in respect of the contents of the originating summons. (p 981 e-g)

[Application allowed; order for sale granted.]

Case(s) referred to:
Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 SC ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 FC ***(foll)***
Maimunah Megat Montak v. Mayban Finance Bhd [1996] 3 CLJ 9 FC ***(refd)***
Ng Hee Thoong v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Ooi Bee Tat v. Tan Ah Chin & Sons Sdn Bhd [1995] 4 CLJ 484 SC ***(foll)***
Pepper (Inspector of Taxes) v. Hart and Related Appeals [1993] 1 All ER 42 ***(refd)***
Siong Holdings Sdn Bhd v. Development & Commercial Bank [1997] 1 CLJ 590 CA ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 23(1)(d)
National Land Code, ss. 242, 256(2), (3), 257(1)(e), 258, 259, 340, 431(b)(ii)
Rules of the High Court 1980, O. 7 r. 3, O. 83 r. 1

Other source(s) referred to:
NS Bindra, *Interpretation of Statutes*, 8th edn, p 94

For the plaintiff - AS Lua (Mohd Syukran Mohd Noordin); M/s Soo Thien Ming & Nashrah
For the defendant - YC Lee; M/s Thangaraj & Assoc

Reported by WA Sharif

JUDGMENT

Heliliah Mohd Yusof J:
This is an application for an order for sale of land made pursuant to s. 256 of the National Land Code (NLC) by the plaintiff and the application was made in accordance with O. 83 r. 1 of the Rules of the High Court 1980 (RHC).

The plaintiff and the defendant had concluded a facility agreement dated 27 October 1996. The facility agreement, by virtue of cl. 2.1 was for an amount of Ringgit Malaysia four million nine hundred thousand (RM4,900,000) for the following borrowings:

(i) Borrowings under a term loan facility which shall not at any time exceed Ringgit Malaysia two million two hundred thousand (RM2,200,000).

(ii) Borrowings under an overdraft facility which shall not at any time exceed Ringgit Malaysia two million (RM2,000,000).

(iii) The aggregate of all borrowings under letter of credit facility (the LC Facility), trust receipt facility (the TR Facility) and banker's acceptance facility (the BA Facility) shall not at any one time exceed Ringgit Malaysia seven hundred thousand (RM700,000).

Further to the facility agreement, the defendant (chargor), being the proprietor of the land described as Lot 739, seksyen 1, Geran No. Pendaftaran 294 Bandar Georgetown Daerah Timur Laut, Negeri Pulau Pinang made out a charge to the plaintiff under s. 242 of the NLC on 27 October 1996. The charge was duly registered on 30 November 1996. In the annexure to the charge, the facility agreement, the charge and the other security documents and other documents for the time being which constituted the security for the facilities or any parts thereof were collectively referred to as the loan documents.

The annexure to the charge also contains several clauses whereby the defendant/chargor covenanted to the plaintiff/lender as follows:

2. UNDERTAKING TO PAY

2.1 The Chargor hereby covenants with the Lender that as and when the Indebtedness or any part thereof is due for payment in accordance with the provisions of any Loan Document or on such earlier date as the security constituted by this Charge becomes enforceable and the Lender becomes entitled to exercise the rights and powers upon default provided under this Charge and by law the Chargor shall pay to the Lender in the manner specified in the Loan Documents, the Indebtedness or, as the case may be, the part thereof due to be paid and, in the meantime will pay to the Lender interest (as well after as before any judgment), at the rates and calculated in the manner prescribed in the Loan Documents on the Indebtedness from time to time outstanding.

8. DEFAULT

If:

8.1 the Chargor shall fail to observe or perform any of its agreements, covenants, stipulations, terms and conditions contained in this Charge; or

8.2 an Event of Default as defined in Clause 14.1 of the Facility Agreement shall occur, then and in either of such cases, the amount of the Indebtedness outstanding for the time being shall immediately become payable by the Chargor to the Lender on demand and the Lender shall forthwith be entitled to exercise the rights and powers upon default provided by law and this Charge without any previous notice to or concurrence on the part of the Chargor.

8.3 A written statement of the Lender as to the Indebtedness shall be final and conclusive and binding on the Chargor and shall not in the absence of manifest error, be questioned on any account whatsoever.

8.4 …

9. DEMANDS

9.1 Any demand for payment of the amount of the Indebtedness for the time being outstanding may be made by a notice in writing requiring payment within seven (7) days from the date thereof and may be signed on behalf of the Lender by its Manager or any other officer of the Lender or by any solicitor or firm of solicitors purporting to act for the Lender and such notice shall be deemed to have been sufficiently served on the Chargor if it is left at the registered office for the time being of the Chargor or, at the usual or last known place of business of the Chargor or, at such address as the Chargor may notify to the Lender or sent by registered letter to any of such addresses and, in the last mentioned case, the service shall be deemed to be made at the time when the registered letter would in the ordinary course of post be delivered.

10. BREACH OF COVENANT

10.1 In the event of any breach by the Chargor of any of the agreements, covenants, terms, stipulations and undertakings herein provided and on the part of the Chargor to be observed and performed (including the agreement or covenant to pay on demand as aforesaid the amount of the Indebtedness for the time being outstanding and owing to the Lender) occurring and continuing for a period of not less than SEVEN (7) DAYS it shall be lawful for the Lender forthwith to give the statutory notice pursuant to the provisions of the Code requiring the Chargor to remedy the said breach within a period of SEVEN (7) DAYS and service of such notice shall be effected in the same manner as a notice demanding payment as provided in Clause 9 or as may be prescribed by the Code.

…

23. INCORPORATION OF FACILITY AGREEMENT

23.1 The Chargor hereby covenants and agrees that during the continuance of the Facilities, all the provisions, covenants, stipulations, conditions, undertakings and agreements contained in the Loan Documents shall, unless repugnant to any of the provisions contained herein, be read as forming part of this Charge and shall be applicable with full force and effect as if the same were set out hereunder.

It is necessary to set out in detail certain clauses in the facility agreement (exh. AK2) which refers to the terms and conditions of the borrowings including the following clauses:

a **3.3 Interest Rate**

The rate of interest payable on the Term Loan or any part of it shall be the rate determined by the Lender to be one point seven five per cent (1.75%) per annum over and above the Lender's Base Lending Rate.

b **3.4 Payment of Interest**

Until such time as the borrower shall commence to make payment of the instalments as prescribed under Clause 3.5, the Borrower shall pay interest on the Term Loan monthly at the rate stipulated under Clause 3.3 which shall be calculated monthly on the basis of actual days elapsed and a year of 365 days commencing on the first (1st) day of the month following the Drawing on the TL Facility and compounded on a monthly basis.

In respect of the overdraft facility, cls. 4.5 and 4.8 state as follows:

4.5 Interest

d Until such time as the Borrower shall repay the whole of the OD Facility, the Borrower shall pay to the Lender interest at the rate of two per cent (2%) per annum over and above the Base Lending Rate of the Lender on every sum advanced to or on behalf of or otherwise howsoever payable by the Borrower under the OD Facility monthly and in arrear from the date on which the sum or sums in question shall first be advanced or paid out by the Lender.

e 4.6 ...

4.7 …

4.8 Excess Overdrawn

f The OD Facility shall not be overdrawn by the Borrower in excess of the limit approved by the Lender. In the event the OD Facility is overdrawn beyond the limit approved, the Borrower shall pay to the Lender additional interest on the excess overdraft at such rate as the Lender may determine at its absolute discretion over and above the interest rate already charged on the OD Facility.

g With regard to the banker's acceptance facility the loan facility agreement stipulates in cl. 7.6 as follows:

7.6 Commission

h The Borrower shall pay commission in respect of each Bill accepted pursuant to the BA Facility at the rate of one point five per cent (1.5%) per annum over and above the prevailing interbank offered rate for bankers acceptance on the face value of that Bill for the number of days discounted and shall be paid to the Lender on the date of acceptance of that Bill. Any commission

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so payable shall be paid by the Borrower and unless so paid shall be deducted from the amount payable by the Lender to the Borrower in respect of that Bill.

Related to the aforementioned clauses is also cl. 13.5:

13.5 Default Interest

(a) If the Borrower fails to pay any amount in accordance with this Agreement, the Borrower shall pay interest in Ringgit Malaysia on that amount from the time of default up to the time of actual payment (as well after as before judgement) at the rate of one per cent (1%) per annum over and above the respective rates prescribed under this Agreement or such other rate as shall be determined by the Lender from time to time at its absolute discretion subject always to a minimum default payment of Ringgit Malaysia Five (RM5.00) per month.

(b) Interest under this Clause shall accrue daily on the basis of a year of 365 days and shall immediately be due and payable by the Borrower. So long as the default continues, the rate referred to in Clause 13.5(a) shall be calculated on a similar basis daily and interest payable under Clause 13.5(a) which is unpaid at the end of each day shall thereafter itself bear interest at the rate provided in Clause 13.5(a).

(c) Interest as set out in Clause 13.5(a) and (b) shall continue to be payable notwithstanding that the relationship of banker and customer between the Lender and the Borrower may cease for any reason whatsoever.

The facility agreement also included provisions on variation of interest as well as the manner of notification of the changes. This is found in cl. 8 of the facility agreement, the provisions of which are as follows:

8. VARIATION, CANCELLATION AND DEMANDS

8.1 Variation of Interest

Notwithstanding the provisions relating to the rate of interest commissions and other banking charges as herein provided the Lender shall be entitled at any time and from time to time to vary at its absolute discretion the following:

(i) the rate of interest by variation of the margin or the Base Lending Rate;

(ii) the manner, method and/or mode of determining such rate of interest; and

(iii) the other commissions, discounts, banking charges and any other levies.

8.2 Notification of Changes

The Borrower hereby agrees that the Lender shall be entitled to adopt any one or more of the following manners or methods of communication concerning the variation of interest stipulated under Clause 8.1:

(a) by posting a notice in the Lender's premises stating such change and its effective date of change; and /or

(b) by way of a single publication in one or more newspapers of the Lender's choice of such change and its effective date of change; and/or

(c) by posting an insertion in the Lender's statement of account of such change and its effective date of change; and/or

(d) by posting a notice of such change and its effective date of change to the Borrower by way of an ordinary or registered post.

....

20.6 Notices

Any notice or communication under or in connection with this Agreement other than provided for in Clause 8.2 hereof shall be in writing and shall be delivered personally, or by post, telex or cable or facsimile to the addresses given in this Agreement or at such other address as the recipient may have notified to the other parties in writing. Proof of posting or despatch of any notice or communications to the Borrower shall be deemed to be proof of receipt:

(a) in the case of a letter delivered personally, on the day of delivery;

(b) in the case of a letter, on the second day after posting;

(c) in the case of a telex or cable or facsimile, on the day of dispatch.

The affidavit of the plaintiff disclosed that on 24 January 2002 a notice of demand was sent to the defendant at two addresses namely No. 64A, First Floor Damai Complex, Jalan Lumut, 50400 Kuala Lumpur and No. 6A, Jalan SS 20/10, Damansara KIM, 47400 Petaling Jaya, Selangor Darul Ehsan.

On 19 February 2002 the notice of default with respect of a charge Form 16D was served on the defendant at No. 37M and 39M Medan Setia Satu, Plaza Damansara, 50490 Kuala Lumpur. The Form 16D was served on 21 February 2002 also at two addresses ie, one was left at 37M and 39M, Medan Setia Satu, Plaza Damansara, 50490 Kuala Lumpur and another at No. 64A Tingkat Satu, Damai Kompleks, Jalan Lumut 50450 Kuala Lumpur.

In the case of the latter the service was acknowledged. The plaintiff disclosed that the defendant had defaulted in making payments resulting in the plaintiff issuing the notice of demand as well as Form 16D. As at 31 October 2001 the certificate of indebtedness disclosed the following amount:

Certificate of Indebtedness

1) Borrower: Entigma Sdn Bhd
Facilities Agreement Dated 27.10.1996

2) Chargor: Entigma Sdn Bhd
Charge vide presentation No: 21682/96
Volume 715 Folio 114 dated 30.11.1996

3) Guarantors: i) Rajaram a/l Letcheminasamy

ii) Jacqueline Mary Rowley

iii) Dinesh Kumar a/l Jashbai Patel

Guarantee dated 23.10.1996

I hereby confirm that the amount owing under the above Facilities Agreement, Charge and Guarantee as at 31st October 2001 is as follows:

OVERDRAFT FACILITY OF RM2,000,000.00

(a) the sum of RM2,754,099.93;

(b) together with further interest thereon as the rate of 2.00% per annum above the Base Lending Rate ("BLR"). (BLR on 31st October 2001, was 6.4%) i.e. 8.40% per annum compounded monthly on the limit of RM2,000,000.00; and

(c) penalty interest at the rate of 3.50% per annum above the BLR i.e. 9.90% per annum compounded monthly on the excess amount RM754,099.93.

both (b) and (c) above from 1st November 2001 to the date of full settlement.

TERM LOAN RM2,200,000.00

(a) the sum of RM3,105,424.68

(b) together with further interest thereon the rate of 1.75% per annum above the BLR i.e. 8.15% per annum compounded monthly from 1st November 2001 to the date of full settlement.

BANKERS ACCEPTANCE

the sum of RM948,787.51 which is the total outstanding for four (4) overdue bills as at 31st October 2001 together with further interest thereon at the rate of 3.50% per annum above the BLR i.e. 9.90% from 1st November 2001 to the date of full settlement. Particulars of the Bankers Acceptance are as follows:

(a) BA037588NL – RM271,217.11 comprising of Principal – RM198,00.00 and interest from 26/6/98 – 31/10/01 – RM73,217.11;

(b) BA037590NL – RM174,337.25 comprising of Principal – RM129,000.00 and interest from 04/8/98 – 31/10/01 – RM45,337.25;

(a) BA037589NL – RM257,948.41 comprising of Principal – RM191,000.00 and interest from 06/8/98 – 31/10/01 – RM66,948.41;

(a) BA037591NL – RM245,284.74 comprising of Principal – RM182,000.00 and interest from 12/8/98 – 31/10/01 – RM63,284.74.

The defendant had raised several matters pertaining to the claim by the plaintiff to invoke s. 256 of the NLC. A preliminary matter raised by the defendant was to object to the plaintiff's application on the ground that since the land that was charged is situated in Penang the exercise of jurisdiction by a court in Kuala Lumpur was in excess of s. 23(1) of the Courts of Judicature Act 1964. The plaintiff's response to this was that both the plaintiff and defendant were residents within the jurisdiction of the Kuala Lumpur High Court. It is found that this preliminary objection is not sustainable. As s. 23(1)(d) relates to a situation where there is a dispute on the ownership of the land this is not a matter where the ownership is disputed but a matter where the plaintiff seeks to execute its statutory rights vested in it as a result of the land having been charged. At the time submissions it was mentioned to counsel for the defendant that an application should have been made for transfer but there was no such application and no further valid reason was given in respect of the question of the court in Kuala Lumpur not having jurisdiction over the matter since it was not even disputed that the defendant had its place of business in Kuala Lumpur.

Before dealing with another argument of the defendant concerning the contents of the originating summons that was filed by the plaintiff it is noted that what was repeatedly argued by the defendant is that the plaintiff had acted in breach of the terms of the facility agreement in a manner which in the words of the defendant was:

mengenakan kadar faedah, faedah lewat, penalti, komisyen, caj-caj dan lain-lain bayaran yang tidak dipersetujui oleh pihak Defendan.

The defendant also contended as follows:

bahawa kadar faedah dan lain-lain bayaran yang dikenakan oleh pihak plaintif telah dinaikkan secara mendadak pada tahun 1997 dan 1998 tanpa mendapat persetujuan Defendan atau dengan mengikuti terma-terma Gadaian atau Perjanjian Kemudahan berkenaan.

According to the defendant also at para. 12 encl. (6) the plaintiff was required to submit in detail the amount of interest, charges and commission that were imposed on the defendant's account from 1996 onwards. Throughout it is found that what had been averred by the defendant amounted to a general denial of the claims made by the plaintiff.

The affidavit of the plaintiff (encl. (7)) disclosed the following that is on 5 May 1998 the defendant was informed as to the status of their current account balance which was stated to be in excess of RM21,701.29 due to overdraft interest. This was in respect of the overdraft facility. A repeated reminder was sent. On 2 July 1998 a reminder was sent in respect of the term loan instalments and the amount in arrears as at 1 July 1998 was RM149,233.23. It was clear that the defendant was informed on 2 July 1998 that the overdraft account had been in excess since 1 May and was then due for classification as a non-performing loan. The correspondence between the plaintiff and the defendant also indicated that there were attempts on the part of the defendant to dispose of the land to other parties in an attempt to settle the loan facility and to resolve the issue on the outstanding amount. Page 198 of encl. (7) (second affidavit of the plaintiff) also disclosed that the defendant had tried to negotiate for reduction of the interest sum. Page 200 of the same enclosure also disclosed that by a note dated 7 January 2002 the defendant was making further request from the plaintiff to restructure the facility.

The court, in exercising its discretion under s. 256(3), shall order the sale of the land to which the charge relates unless it is satisfied of the existence of "a cause to the contrary". The cause to the contrary that had been referred to by the defendant as already mentioned above had also been in relation to the jurisdiction of the court but which I find to be unfounded.

In *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332 the Supreme Court stated, *inter alia*, as follows:

The principle governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory

> remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s. 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue.

The main issue raised by the defendant appears to be the amount and the manner in which the interest and other charges such as the commission that have been imposed by the plaintiff throughout the period that had been claimed that is where since May 1998 the defendant is alleged to have been in default.

In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36, the Federal Court elaborated further on the provisions of s. 256(3) of the NLC. In that case the counsel for the appellant who was the registered proprietor of a piece of land that was charged to the respondent bank to secure a loan had raised a similar argument that the bank had varied the rate of interest without giving any notice of the same to the appellant. The Federal Court explained that a cause to the contrary within s. 256(3) of the Code might be established only in three categories of cases: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the Code; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity. If no cause to the contrary could be shown, the court would be obliged to make an order for sale.

At p. 51 of the same decision Gopal Sri Ram JCA also stated:

> A judge hearing an application under s. 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.
>
> In this last respect, if he is satisfied, on a careful and an objective assessment of the factual material made available to him, that the chargor has shown cause to the contrary in the sense we have discussed earlier in this judgment, he will refuse an order for sale. On the other hand, if he finds as a matter of law that the allegations raised by the chargor do not constitute cause to the contrary he will merely say so, giving his reasons, and grant the chargee's application.

> On no account should he express any view on the merits of any or all of the points taken by the chargor, save to say whether, having regard to the three narrow categories we have laid down in this judgment and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction. This is because, for reasons which will appear in a moment, any view expressed by a judge on the general merits of the points taken by the chargor will be purely academic.
>
> Although each case turns upon its own facts, we propose to consider, by way of illustration only, the usual kind of case with which this court has been faced on numerous occasions. An application under s. 256 is opposed by the chargor on the ground that the chargee has acted in breach of contract, eg by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not giving any proper account of the sums paid by the borrower. A judge faced with such complaints will merely say that they do not, on a proper reading of s. 256(3) and the authorities which have considered the section, constitute cause to the contrary. He will not, and ought not to, enter upon a discussion of the question whether any or all of these complaints have or are devoid of any merit. Much confusion and difficulty has been occasioned in this area of the law by a failure on the part of those concerned with the task of dealing with applications under s. 256 to properly appreciate their true role assigned to them by Parliament.

Having regard to *Low Lee Lian*'s case it is found that the defendant had not raised any cause to the contrary in so far as the allegations that the plaintiff had not given any notice about the variation of interest. The exhibit to encl. (7) disclosed the notices and variations that had been given to the defendant and although the defendant had raised some objections about the addresses as to where the notices had been sent, the addresses have in fact been identified as a result of the letters and correspondence that had emanated from the defendant company. In any case the plaintiff had also sent the notices to an address which was already identified in the facility agreement itself.

As far as notices had been sent the following is noted:

(a) When the defendant was informed that the current account balance was in excess of RM2,021,701.29 DR at 5 May 1998 which was in excess of RM21,701.29 due to over draft interest the letter was addressed to 37M & 39M Medan Setia 1, Bukit Damansara 50490 Kuala Lumpur (AK6 p. 185).

(b) Another letter dated 6 October 1998 (AK6, Pg 191) was addressed to Entigma Sdn Bhd 6A, Jalan SS 20/10 Damansara Kim 47400 Petaling Jaya Selangor Darul Ehsan.

In the facility agreement it is stated that Entigma Sdn Bhd was having a registered office at 37M & 38M, Medan Setia Satu, Plaza Damansara 50490 Kuala Lumpur. According to AK4 Form 16 D was sent to 37M & 39M, Medan Setia Satu, Plaza Damansara 50490 Kuala Lumpur as well as at another address. It is found that encl. (7) discloses that the plaintiff had sent statements to the address that was stipulated in the agreement. One other address is an address which the defendant itself had used as disclosed at AK7 (p. 192). In so far as the Form 16 D is concerned it is noted that the service of the notice is consistent with the provision of s. 431(b)(ii) of the NLC.

The second and third affidavits in reply of the defendant constitute repetitions of the 1st affidavit in reply. The defendant other than averring to the lack or absence of knowledge on the variation of the interest had not disclosed by way of affidavit any matter that can be termed a cause to the contrary. There was even an allegation that there was correspondence addressed to the plaintiff which was supposed to be "without prejudice". Such an allegation without any further affidavit has not established that the defendant had no notice of the amount of interest or the rate of interest. In *Ng Hee Thoong v. Public Bank Bhd* [1995] 1 CLJ 609, the learned judge delivering the judgement of the Court of Appeal stated (at p. 615):

> It is a fundamental principle to our system of adversarial litigation that evidence upon a matter must be given on oath. The practice of counsel giving evidence from the Bar is to be deprecated.

I find that there were occasions when the counsel for the defendant intentionally or otherwise was attempting to mislead the court. For instance at one stage it was alleged that there must be a separate account for the overdraft account. Counsel did not give any plausible explanation for such an assertion.

It is also found that in so far as the rate of interest is concerned, the defendant had not established any cause to the contrary as the facility agreement had included provisions relating to the variation of interest in respect of which the defendant had not shown that he had in any way disputed that the plaintiff had no right under the agreement to impose and vary the interest.

The agreement in respect of the charge had stated that a written statement of the lender as to the indebtedness shall be final, conclusive and binding on the chargor. The defendant had disputed the manner in which the rate of interest had been revised but it is noted that the rate of interest is stipulated in the agreement and it is dependent on the revision of the bank's base lending rate or terms stipulated in the agreement. The plaintiff's affidavit (AK5A) in several enclosures pp. 104 through 174 had shown copies of the bank's statements. The defendant's allegations would amount to court having to examine the alleged

incorrect account of the defendant and following the decision in *Siong Holdings Sdn Bhd v. Development & Commercial Bank* [1997] 1 CLJ 590, any alleged discrepancy is not a matter for litigation in proceedings pursuant to s. 256 of the NLC.

If at all there was any basis of the defendant's allegation of the cause to the contrary, it was a provision of s. 257 which is to be read with s. 256.

At the outset counsel for the defendant had argued that the application of the plaintiff ought to be struck off on the ground that it was not in conformity with the requirements of O. 83 in so far as O. 83 refers to an action begun by an originating summons in this case instituted by a chargee. The contention of counsel for the defendant is that the contents of the originating summons was defective in that it had omitted to include a statement that relates directly to s. 257(1)(e) of the NLC. Order 7 r. 3 of the Rules of the High Court 1980 stipulates that every originating summons must include a statement of the questions on which the plaintiff seeks determination or direction of the court or as the case may be a concise statement of relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause of action. The basis of the defendant's counsel's insistence that para. (e) of s. 257(1) of the NLC should be incorporated in the originating summons appeared to have stemmed from the construction of s. 257 as well as the decision in *Maimunah bte Megat Montak v. Mayban Finance Bhd* [1996] 3 CLJ 9. In that case there was an appeal by the chargor to have an order of the High Court enforcing a charge registered under the NLC. The order was made pursuant to the chargee's application by way of an originating summons, wherein the principal relief prayed for was that the charged land be sold by public auction to satisfy the total amount due and owing to the chargee under the charge. As was stated by Edgar Joseph Jr FCJ:

> As it was common ground that the order for sale aforesaid had neither fixed the auction date nor stipulated the amount actually due under the charge, as required by s. 257(1)(b) and (c) of the Code, respectively, we invited counsel on both sides to argue, as a preliminary point of law, the question of what the legal consequences of such non-compliance were.
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> Section 257(1) provides:
>
> 257(1) Every order for sale made by the Court under section 256 shall:
>
> (a) provide for the sale to be by public auction;
>
> (b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;

(c) specify the total amount due to the chargee at the date on which the order is made; and

(d) require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question.

At the conclusion of the argument, we were unanimously of the opinion, that the provisions of s. 257(1)(a) to (d) were mandatory, and as the order for sale in the present case had suffered from the defects herebefore mentioned, it was thereby invalidated.

It is to be noted that the order for sale that had been made by the High Court in that case and which became the subject matter of an appeal had not fixed an auction date nor the amount actually due and that the provisions of s. 257(1) (a-d) were mandatory. By an analogous reasoning, counsel for the defendant had contended that the existing new paras. e-h had also to be incorporated in the contents of the originating summons. I had disagreed with the contention of the counsel for the defendant for the following reasons. It is not disputed that s. 257(1) utilises the word "shall" but it was clear that the provisions of a-d pertain to the order that was to be made by a court after making the finding upon an application for an order for sale. The court was satisfied that there was not in existence a cause to the contrary as explained in the cases cited above. Section 257 is a consequence that follows in that it is addressed to the court as to what should be the contents of an order for sale once it is satisfied that a chargor has not been able to establish the existence of a cause to the contrary. Although originally I was minded to allow an amendment to be made to the originating summons before any order is made in the event that a finding is made in favour of the application at the conclusion of the submission, I found that it would create an unjustifiable precedence to require that the substance of paras. e, f, g, h of s. 257(1) be incorporated in the originating summons as it would tantamount not only to changing the law in the sense of legislating judicially but also to change the purport of s. 256. Section 257 is not to be read in isolation but to be read together with ss. 258 and 259 of the NLC. The decision of the Federal Court in *Maimunah bt Megat Montak*'s case cannot be literally and blindly applied in respect of the construction of s. 257 as it would result in an amendment that is not intended by s. 257 in that it has the effect of the substance of paras. e-h being litigated as though it is part of the processes which the court has to deal with in considering an application pursuant to s. 256. The contention of the counsel for the defendant would in fact result in changing the manner in which an application for an order for sale by a chargee is to be made under s. 256(2) which states that it has to be done in accordance with the provisions of any law for the time being in force relating to civil procedures.

Section 257 of the National Land Code was amended *vide* the National Land Code (Amendment) Act 2001 (Act A1104) Laws of Malaysia. The Bill which was tabled in Parliament and read the first time in Dewan Rakyat on 15 November 2000 incorporated, *inter alia*, the following in the Explanatory Statement with regard to the amendment that was effected to s. 257 (that is cl. 25 of the Bill):

> Clause 25 seeks to amend section 257 of the Code to provide that the **order of sale** by public **auction shall be** in Form 16H and provides for **the imposition of additional conditions** of the sale by the Registrar of the Court, that the bidder must possess a sum equivalent to ten per cent of the reserve price, the purchase price shall be paid to the chargee, the purchase price must be settled within one hundred and twenty days from the date of sale, there shall be no extension of that date to settle payment and, where the purchase price is not paid in full within the stipulated number of days, the deposit shall be forfeited and disposed of in the manner specified under the Code. (emphasis added)

It would appear that the amendments which came into force on 1 December 2001 were introduced with the object of imposing additional conditions of the sale by the registrar of the court. The explanatory statement does not therefore support the contention of the counsel for the defendant that the effect of the amendment was to render it necessary for the court at the hearing on the application for sale made pursuant to s. 256, that it is the court that has to make a finding on the matters particularised under paras. 257(1)(e-h).

The contention of the defendant's counsel seems to suggest that there is a confusion about the interpretation to be rendered to s. 257(1)(e-f) resulting from the amendment. The amendment requires an order for sale to be in Form 16H. The amendment to s. 257(1) and the insertion of Form 16H were effected through the passage of the same Bill as mentioned above.

The amendment does not constitute a change in the sequence of the enforcement of an order for sale made by the court pursuant to s. 256. No doubt s. 257 states that the order shall be made in Form 16H but it serves as a directive to the court what must be stated in the order for the registrar to deal with in the course of a sale. Section 257 is to be read with s. 259 that a sale is made pursuant to an order under s. 256 which "shall take place under the direction of an officer of the court." Moreover even before the amendments to s. 257 were introduced s. 257(1)(d) itself had stated that it is the registrar of the court which is to fix a reserve price for the purpose of the sale. Practice Note No. 2 of 1987 states as follows:

It has been brought to the attention of the Honourable Chief Justice Malaya that a practice existed in some High Courts for the senior assistant registrar instead of the Judge to make orders for sale of land/lease and deal with matters consequential thereto. Such a practice is contrary to section 257 of the National Land Code 1965.

2. The Honourable Chief Justice Malaya thereby directs that henceforth the practice shall be for the Judge of the High Court to make the orders as prescribed in paragraphs (1), (b) and (c) of subsection (1) of section 257; the order for sale shall provide for it to be held by public auction on a date to be specified therein being a date not less than one month after the date of the order with the total amount due to the chargee as at the date of the order duly stated. The Judge shall also make an order that the reserve price and other directions with respect to the sale be made by the senior assistant registrar.

The following Practice Direction is also noted:

Practice Direction No 8 of 1987

Enforcement of Judgment in Foreclosure Proceedings

The Honourable Chief Justice directs with immediate effect that the procedure to be followed in enforcing the judgment in foreclosure proceedings in the High Court at Kuala Lumpur shall be as follows:

1. On extraction of the fair orders in foreclosure proceedings from the Civil Division, two copies of the order for sale and one copy of the order for directions accompanied by the valuation report shall be filed at the Registry of the Enforcement of Judgments Division.

2. On presentation of the said orders at the registry, it shall be registered as an application for execution.

3. All subsequent proceedings in the aforesaid foreclosure shall be dealt with by the Enforcement of Judgments Division. All correspondence and enquiries arising therefrom shall be directed to the Enforcement of Judgments Division (Attention: The Deputy Registrar) and quoting the application for execution reference number.

In *Ooi Bee Tat v. Tan Ah Chin & Sons Sdn Bhd* [1995] 4 CLJ 484, Zakaria Yatim JCA had stated that practice directions have no statutory authority and are intended to be no more than a directive for administrative purposes. Nevertheless, s. 257(1)(a-d) as it stood erstwhile even prior to the amendment had stipulated that the order of the court shall require the registrar of the court to fix a reserve price. The explanatory statement to the amendment Bill also indicated that the object of the amendment was to introduce additional and further conditions to be observed when the sale is being conducted.

Form 16H does not show any conflict with the provisions of s. 257. Instead it sets out the various particulars which are to be stipulated upon an order for sale being made. N.S. Bindra on the *"Interpretation of Statutes"* (8th edn) states (at p. 94):

> Forms appended to a Schedule to a statute may be referred to for the purpose of throwing light on the construction of the statute. If such forms are merely given as models, and by way of example, or for departmental purposes, their bearing on the construction of enacting sections is less than if they form an essential element in the operation of a statute. If a form included in a Schedule to a statute is made imperative by the statute, or is in terms which indicate that it is intended to be imperative, it must be strictly followed.
>
> The meaning of an Act should not be derived from the forms which may be prescribed by the Government under its rule-making power. And Schedule forms are always dangerous guides to the meaning of a statute. But Courts can derive support by a reference to the statutory forms and rules with a view to show that they are not alone in the view which they have taken of the section.
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> **Lord Sterndale's rule –** In *Inland Revenue Commissioners v. Gittus*, Lord Sterndale, M.R., observed: "It seems to me there are two principles of rules of interpretation which ought to be applied to the combination of Act and Schedule. If the Act says that the Schedule is to be used for a certain purpose and the heading of the part of the Schedule in question shows that it is *prima facie* at any rate devoted to that purpose, then you must read the Act and the Schedule as though the Schedule were operating for the purpose, and if you can satisfy the language of the section without extending it beyond that purpose you ought to do it. But if inspite of that you find in the language of the Schedule words and terms that go clearly outside that purpose, then you must give effect to them and you must not consider them as limited by the heading of that part of the Schedule or by the purpose mentioned in the Act for which the Schedule is *prima facie* to be used. You cannot refuse to give effect to clear words simply because *prima facie* they seem to be limited by the heading of the Schedule and the definition of the purpose of the Schedule contained in the Act.

In *Pepper (Inspector of Taxes) v. Hart and Related Appeals* [1993]1 All ER 42, the House of Lords adopted the purposive approach to the construction of legislation and having regard to that approach had stated that in order to give effect to the true intention of the legislature, the rule prohibiting courts from referring to Parliamentary material as an aid to statutory construction should, subject to any question of parliamentary privilege, be relaxed so as to permit reference to parliamentary materials where, *inter alia*, the material relied on consisted of statements by a minister or other promoter of the Bill which led

to the enactment of the legislation together if necessary with such other parliamentary materials as was necessary to understand such statements and their effect.

Lord Browne-Wilkinson dealt with the approach as follows (at p. 69):

> The Attorney-General raised a further constitutional point, namely, that for the court to use Parliamentary material in construing legislation would be to confuse the respective roles of Parliament as the maker of law and the courts as the interpreter. I am not impressed by this argument. The law, as I have said, is to be found in the words in which Parliament has enacted. It is for the courts to interpret those words so as to give effect to that purpose. The question is whether, in addition to other aids to the construction of statutory words, the courts should have regard to further source. Recourse is already had to white papers and official reports not because they determine the meaning of the statutory words but because they assist the court to make its own determination. I can see no constitutional impropriety in this.

The decision in *Pepper v. Hart* indicates that in arriving at the legal meaning of an enactment a court may have regard to any statement, as set out in the Official Report of Debates (Hansard) on the Bill for the enactment, which satisfies the requirement that the statement must be made by or on behalf of a Minister or other person who is the promoter of the Bill and the statement is clear.

During the second reading of the amendment to the NLC which transpired on 8 May 2001, the Minister responsible for Land and Cooperative Development stated, *inter alia*, as follows:

> Tuan Yang di-Pertua, perlaksanaan lelong awam dari peringkat permohonan pemegang gadaian seperti bank dan institusi kewangan sehingga pengagihan hasil lelongan kepada pihak-pihak yang berkenaan adalah diuruskan oleh pejabat tanah. Dan dengan beban kerja yang semakin meningkat, ianya didapati mengambil masa yang panjang. Untuk mengatasi masalah ini, dasar dan prosedur telah disemak semula dan beberapa pindaan kepada Bab 3, Bahagian XVI dibuat supaya lelongan awam dapat diselesaikan dengan lebih cepat.
>
> Dasar utama yang dicadangkan ialah memperluaskan penglibatan bank dan institusi kewangan dengan mempertanggungjawabkan mereka menerima dan menguruskan wang deposit dan keseluruhan hasil jualan tanah yang berkenaan. Prosedur lelongan awam juga diperkemaskan supaya dapat dilaksanakan dengan cepat dan lebih adil kepada tuan tanah. Untuk maksud ini, perkara-perkara penting yang dicadangkan dipinda adalah seperti berikut:
>
> (i) …

(ii) dalam Perintah Jualan, syarat-syarat baru ditetapkan iaitu setiap orang atau badan yang ingin mengambil bahagian hendaklah mempunyai 10% daripada harga rizab sebagai deposit. Sekiranya harga bayaran sepenuhnya tidak dijelaskan pada masa lelongan, deposit akan dibayar terus kepada pemegang gadaian dan baki dibayar dalam tempoh 120 hari. Tempoh tersebut tidak akan dilanjutkan dan sekiranya bayaran tidak diselesaikan, deposit tersebut akan dirampas dan dibahagikan menurut Seksyen 267A;

(iii) selepas Perintah Jualan Lelongan Awam dikeluarkan pemegang gadaian dengan persetujuan penggadai diberikan satu peluang memohon menangguhkan penjualan bagi tempoh tidak melebihi tiga bulan atau membatalkan Perintah Lelongan Awam menurut seksyen baru 264A sekiranya hutang penggadai dapat diselesaikan pada ketika itu;

(iv) …

(v) selepas lelongan awam yang berjaya, pemegang gadaian dikehendaki menyediakan suatu penyata mengenai hutang yang ditanggung oleh penggadai seperti tunggakan cukai tanah dan kos urusan mahkamah atau pentadbir tanah berhubung dengan lelongan awam tersebut. Penyata ini akan disampaikan kepada penggadai dengan salinan kepada mahkamah atau Pentadbir Tanah. Penyata ini penting untuk tujuan hasil lelongan oleh pemegang gadaian kepada semua pihak yang terlibat sebaik sahaja bayaran penuh diterima, pemegang gadaian dikehendaki membahagikan hasil jualan itu seperti ditentukan dalam Seksyen 268;

Having regard to the above there are two stages involved in the processes under s. 256 and s. 257 of the NLC 1965. The court having made an order for sale and the order for sale having to be in the Form 16H as introduced by the amendment, the effect of having the form is to declare the condition under which an order for sale has to be observed. Accordingly, the argument of counsel for the defendant that paragraphs introduced by the current amendment should also constitute part of the originating summons would result in changing the processes in which the trial is to be conducted and which matter should accordingly be effected not under the NLC but, if at all, under the Rules of the High Court 1980.

The objection of the defendant's counsel was therefore not accepted and in granting the order in terms, no amendments are to be filed by counsel for the plaintiff in respect of the contents of the originating summons.